

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 22-10964-mg

4 Adv. Case No. 23-01167-mg

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6 In the Matter of:

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8 CELSIUS NETWORK LLC,

9

10 Debtor.

11 - - - - - x

12 CELSIUS NETWORK LIMITED,

13 Plaintiff,

14 v.

15 EQUITIES FIRST HOLDINGS, LLC ET AL.,

16 Defendants.

17 - - - - - x

18 United States Bankruptcy Court

19 One Bowling Green

20 New York, NY 10004

21

22 October 24, 2023

23 10:04 AM

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1 B E F O R E :

2 HON MARTIN GLENN

3 U.S. BANKRUPTCY JUDGE

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5 ECRO: KAREN

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1 HEARING re Hybrid Hearing RE: Motion for Relief from Stay to
2 Allow for Setoff of Mutual Obligations.

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4 HEARING re Adversary proceeding: 23-01167-mg Celsius Network
5 Limited v. Equities First Holdings, LLC et al
6 Hybrid Hearing RE: Motion to compel arbitration. (Doc# 9,
7 23, 25)

8
9 HEARING re Adversary proceeding: 23-01167-mg Celsius Network
10 Limited v. Equities First Holdings, LLC et al
11 Hybrid Pretrial Conference. (Doc ## 1 to 4)

12
13 HEARING re Adversary proceeding: 23-01167-mg Celsius Network
14 Limited v. Equities First Holdings, LLC et al
15 Hybrid Hearing RE: Debtor's Motion for Entry of an Order (I)
16 Authorizing the Debtors to File Under Seal the Adversary
17 Complaint Against Equities First Holdings, LLC and
18 Alexander Christy and Redact Certain Information Contained
19 Therein and (II) Granting Related Relief. (Doc## 2, 7, 8,
20 13, 19)

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE COURT: All right, please be seated. Good
3 morning, Ms. Jones.

4 MS. JONES: Good morning, Your Honor. Elizabeth
5 Jones of Kirkland & Ellis on behalf of the Debtors.

6 THE COURT: Okay.

7 MS. JONES: Your Honor, the first item on the
8 agenda today is the Three Arrows motion for relief from stay
9 that was filed at Docket 3569. I believe counsel for Three
10 Arrows is on remotely and I'm happy to let them present
11 first as it was their motion, and then we can discuss our --

12 THE COURT: Sure. All right. Who's appearing for
13 Three Arrows.

14 MR. MONAGHAN: Your Honor, good morning. John
15 Monaghan, counsel -- of Holland & Knight, counsel to the --
16 excuse me, joint official liquidators and Three Arrows
17 Capital. Your Honor, the motion was filed primarily just to
18 check what -- both through the statute and under the
19 Debtors' plan is an administrative box. Three Arrows assert
20 that it has certain BVI rights arising out of unfair
21 preference provisions under applicable BVI law in the BVI.
22 The Debtor has asserted in those proceedings a claim of
23 approximately \$42 million.

24 It is the joint liquidator's assertion that under
25 applicable BVI law, that claim in the BVI is subject to

1 setoff in accordance with a section of the insolvency law
2 down there. As the Court well knows, 553 preserves setoff
3 rights and the Court also well knows the automatic stay
4 prevents assertion of those setoff rights, absent leave of
5 this Court.

6 The Debtors' plan that was -- is currently on file
7 adopts those very provisions by -- that the setoff rights
8 are preserved, that they are unimpaired other administrative
9 claim, but does condition the assertion of those -- of that
10 claim on bringing a motion before this Court.

11 The Debtor and the -- we as counsel to the joint
12 liquidators and the joint liquidators have conferred, have
13 proposed a form of order that does effectuate the ability to
14 preserve and to assert the setoff rights in the BVI claim
15 adjudication proceedings as a setoff and does preserve all
16 of the Debtors' rights, Your Honor, all of Celsius' rights
17 to object, to contest the validity of those of those
18 asserted rights and to also contest the appropriate place
19 for adjudication.

20 So as I said, Your Honor, the primary purpose of
21 this motion is really just to make sure that when the
22 objection is filed to the Debtors' claim in the BVI and when
23 that objection contains a counterclaim asserting setoff
24 rights, that we don't get into trouble with you, Your Honor,
25 for having violated the automatic stay or having violated

1 the discharge injunction, that will end if the Debtor
2 confirms its plan. And so the joint liquidators would
3 respectfully request, Your Honor, that you enter the order
4 that was submitted. It's an updated order that was
5 submitted late yesterday afternoon for your review and
6 entry, if you approve it, Your Honor.

7 THE COURT: And I see from the amended agenda that
8 an amended -- a modified order was submitted as ECF Document
9 No. 3880 in this case.

10 MS. JONES: That's correct, Your Honor.

11 THE COURT: So Ms. Jones, is that a consent,
12 consensual form of order?

13 MS. JONES: Yes, Your Honor, that's correct, and
14 it matches the order we filed as well attached to our
15 statement and reservation of rights at 3841. We just wanted
16 to put it on the docket as a standalone and we have no
17 objection to modifying the automatic stay for the limited
18 purpose of preserving their defense rights, and then as we
19 noted there, we'll preserve our rights and where we also
20 want to have the claim heard.

21 THE COURT: Okay. Does anybody else wish to be
22 heard with respect to Three Arrows' motion? All right, it's
23 granted, then. Thanks very much, Mr. Monaghan. I'm glad
24 that you and the Debtors were able to work out the form of
25 the order.

1 MR. MONAGHAN: Thank you, Your Honor. Thank you
2 very much. And Your Honor, with all respect, I have nothing
3 else before you today. May I be excused from the rest of
4 hearing?

5 THE COURT: You may. Do I have a Word copy of the
6 order?

7 MS. JONES: We'll send that to chambers.

8 THE COURT: You'll send. Send it to chambers and
9 it'll be entered. Thank you, Mr. Monaghan.

10 MR. MONAGHAN: Thank you very much, Your Honor.

11 THE COURT: Okay. So the next matter is in the
12 adversary proceeding, Celsius Network Limited v. Equities
13 First Holdings LLC, Adversary Proceeding 23-01167.

14 MS. JONES: That's correct, Your Honor, and you
15 will get to hear from my colleague, Mr. McCarrick on that
16 one.

17 THE COURT: Okay. Thank you. Mr. McCarrick?

18 MR. McCARRICK: T.J. McCarrick, Kirkland & Ellis,
19 on behalf of the Debtors, Your Honor. I think because this
20 is EFH and Mr. Christy's motion, I'll turn the podium over
21 to them.

22 THE COURT: Okay. Thank you very much.

23 MR. TOROSIAN: Good morning, Your Honor, Jeff
24 Torosian from DLA Piper on behalf of Equities First Holdings
25 LLC.

1 THE COURT: Could you have added more appearances
2 on the front of your pleading? How many offices do you have
3 involved in this?

4 MR. TOROSIAN: Well, we have two, but then we also
5 have co-counsel from IceMiller who represents Mr. Christy
6 and they have, I believe, three --

7 THE COURT: I'm teasing a little bit. That's all
8 right.

9 MR. TOROSIAN: Well, we all ate dinner in New York
10 last night, so --

11 THE COURT: I hope you had a nice dinner. Who you
12 charging it to?

13 MR. TOROSIAN: Business development, Your Honor.
14 Your Honor, we have two motions to be heard today. One is
15 the motion seal which Debtors filed, but obviously we have
16 the burden on, and the other is motion to compel
17 arbitration. We're happy to take them in any order.

18 THE COURT: Tell me what -- I'm not a fan of
19 sealing. Make that clear.

20 MR. TOROSIAN: Sure.

21 THE COURT: I've got a whole line of opinions that
22 deal with sealing. I do it when it's appropriate.
23 Obviously, without telling me the precise language that you
24 -- give me the gist of what this sealing relates to.

25 MR. TOROSIAN: Sure. So there are a few bases for

1 the sealing. So first off, it's tied hand in hand somewhat
2 with the arbitration motion because this is a matter that
3 should be arbitrated, which we'll deal with in a separate
4 argument. That arbitration will be wholly confidential.

5 THE COURT: I think so, but that may not be. May
6 not remain that way.

7 MR. TOROSIAN: Well, it should be. It's supposed
8 to be under the parties' agreement and --

9 THE COURT: Well, look. Let me make one thing
10 crystal clear. The parties' agreement counts for very
11 little as to whether I permit sealing. It's common,
12 appropriate for the parties in the contract to agree on
13 confidentiality, to agree in discovery for confidentiality.

14 I don't -- it's rare that I ever sort of step in
15 the way. But all of that changes when a proceeding is filed
16 in a Court. I understand you say it should be arbitrated
17 and that may be right, but that doesn't affect the standards
18 under Bankruptcy Code 107(b) as to what should be sealed and
19 what should be part of the public record. I just want to
20 make that clear that.

21 MR. TOROSIAN: Understood.

22 THE COURT: I've got a long line of decisions that
23 basically deals with that, and I respect the fact where
24 there is confidentiality provision in a contract or
25 discovery stipulation, it's appropriate to bring the matter

1 here; but quite honestly, it counts for little as to whether
2 or not I permit sealing a matter that relates to a
3 bankruptcy case.

4 MR. TOROSIAN: Understood. We also do have
5 particular confidential information that is within the
6 complaint itself. Obviously, we think we prefer that the
7 whole complaint was sealed pending --

8 THE COURT: It's not.

9 MR. TOROSIAN: -- arbitration --

10 THE COURT: That isn't happening.

11 MR. TOROSIAN: I understand that. But there is --

12 THE COURT: It gets redacted.

13 MR. TOROSIAN: Yes.

14 THE COURT: And the question is, what should be
15 redacted.

16 MR. TOROSIAN: And there is a myriad financial
17 private information, competitive information of Equities
18 First Holdings within the complaint. First of all, the
19 parties agreements, which have confidentiality clauses.

20 THE COURT: Say that again? I'm sorry.

21 MR. TOROSIAN: The parties' agreements that are at
22 issue in the case. There are several agreements that are
23 attached to the complaint. They have confidentiality
24 clauses. Those --

25 THE COURT: But that -- that let me come back to

1 that. Okay. That counts for almost nothing when a lawsuit
2 is filed in my Court, even where the disposition is an order
3 compelling arbitration. Okay. So you can forget that right
4 now. The question is reduction, not wholesale sealing.

5 MR. TOROSIAN: No, I understand. I'm getting to
6 that, Your Honor. The agreements themselves are attached to
7 the complaint. Those agreements have financial terms in
8 them. We believe those should, the very least, be redacted.

9 THE COURT: Tell me why.

10 MR. TOROSIAN: Why?

11 THE COURT: Yes.

12 MR. TOROSIAN: Because that is competitive
13 information for other trades and other activity that
14 Equities First negotiates, and with that information, other
15 counterparties could negotiate different deals. Other
16 competitors could replicate the same --

17 THE COURT: Now you're getting to what the
18 argument should be.

19 MR. TOROSIAN: Yes. And -- look, let me take a
20 step back. Before this case was filed, there were 408
21 settlement negotiations, and those negotiations involved
22 Equities First Holdings providing under Your Honor's
23 protective order highly confidential materials on every
24 single financial piece of data this company has, this
25 privately held company has, small privately held company,

1 all of its financials, bank statements, revenue, profits,
2 forecasts, pipeline deals.

3 THE COURT: Is that an issue? I mean, that's not
4 -- that's in the complaint?

5 MR. TOROSIAN: That's all over the complaint.

6 THE COURT: Okay.

7 MR. TOROSIAN: That's largely what the complaint
8 is based on. Their allegations of insolvency are all based
9 on that data that was given to them under the auspices of
10 408, but also under Your Honor's protective order.

11 THE COURT: Okay.

12 MR. TOROSIAN: So if we are going to file a
13 redacted version of this complaint to be held under seal,
14 all of that financial data, which the only reason they have
15 and the only reason they were able to allege is because of
16 the 408, highly confidential settlement negotiations, should
17 be redacted from the complaint.

18 Your Honor, also as part of those discussions, we
19 gave access to EFH's financial professionals internally to
20 explain all of these documents which also found its way into
21 the complaint. Those professionals were subject to
22 discussions with, I believe, a dozen or so financial
23 professionals on the UCC side and the Debtors' side, all as
24 part of the 408 settlement negotiations, all as highly
25 confidential negotiations under Your Honor's protective

1 order.

2 We understand that the Debtors filed, Celsius at
3 least, filed this complaint under seal and gave us the
4 burden and they said they had no, really, dog in this fight.
5 They didn't believe it's confidential, but they didn't
6 reference in that motion to seal the protective order, which
7 is where all this information came from. It all came from
8 highly confidential information under the protective order.

9 THE COURT: Again, I signed, you know -- and I
10 don't know whether this one was submitted to me or not. I
11 mean, I regularly approve discovery confidentiality orders.
12 The issue becomes when it becomes relevant to a proceeding
13 before me and then the 107(b) standards kick in and
14 determine the outcome.

15 I am -- you reference information that was given
16 to them, you've described as highly confidential financial
17 information about First Equities that were provided part of
18 settlement negotiations, et cetera. I generally agree that
19 that can be maintained under seal. The issue for me is what
20 gets redacted and what doesn't get redacted.

21 MR. TOROSIAN: And we provided, Your Honor, I
22 believe, in our response to the proposed redacted complaint
23 --

24 THE COURT: Well, when you say that's your
25 proposed, does that reflect discussions between you and the

1 Debtors' counsel to try and resolve -- I mean, it's not a
2 one-sided --

3 MR. TOROSIAN: Understood and the difficulty there
4 is the Debtors didn't follow the protective order guidelines
5 for how to do that. If they did, we would have had that
6 discussion.

7 THE COURT: Well --

8 MR. TOROSIAN: We have not had that discussion.

9 THE COURT: We're here today, and what's going to
10 happen today is I'm going to require that counsel meet and
11 confer promptly to try and agree on appropriate redactions,
12 and to the extent that you can't agree, you can submit it to
13 me in camera so I can resolve the remaining disputes.

14 MR. TOROSIAN: Absolutely.

15 THE COURT: I'm not -- I'm really try not trying
16 to be difficult --

17 MR. TOROSIAN: We're happy to do that.

18 THE COURT: It just -- what's what has to happen.

19 MR. TOROSIAN: Yes, absolutely. And we agree, and
20 that's why we submitted the proposed redactions. We have
21 not heard from counsel. We're happy to do that. And we
22 believe, Your Honor, I think we even said in the response,
23 if there's a dispute Your Honor should review it in camera,
24 and I can't imagine there'd be a dispute, honestly.

25 THE COURT: I think you'll work it out.

1 MR. TOROSIAN: Yes.

2 THE COURT: I -- you know, I say that because it's
3 been rare when I've ultimately had to be the one who decided
4 in the end.

5 MR. TOROSIAN: Right.

6 THE COURT: Okay. So that's what -- I'm not
7 taking it under submission today because I'm going to -- I'm
8 adjourning it. I'm going to require you to meet and confer,
9 and here's what I would propose. To the extent you can,
10 prepare -- if you can work it out entirely, submit a
11 proposed revised pleading with the redactions. To the
12 extent that you can't resolve certain issues, submit one
13 that shows in different colors, what your position is, what
14 their position is and I'll -- I hopefully it won't -- if
15 necessary, we can do another hearing. Hopefully it won't.
16 Usually what I just do if that happens, there may be a
17 handful of things you can't agree on. I'll just make the
18 decision and do it. We won't come back here and have
19 another hearing.

20 MR. TOROSIAN: And Your Honor --

21 THE COURT: I'm not trying to prolong --

22 MR. TOROSIAN: No, I think that's -- I think
23 that's a perfectly acceptable to us procedure. The Debtors
24 did not file a reply brief on this motion. They may agree
25 today. I haven't heard from them to our redactions. I

1 don't know. But we're happy to do that in a short time
2 period and --

3 THE COURT: Okay.

4 MR. TOROSIAN: -- get back to you.

5 THE COURT: Mr. McCarrick, are you going to
6 address this?

7 MR. McCARRICK: T.J. McCarrick, Kirkland & Ellis,
8 on behalf of the Debtors. The procedure Your Honor outlined
9 makes good sense to us. We're happy to meet and confer with
10 EFH over the proposed redactions. We would note that we
11 don't agree that much of the information that was exchanged
12 was in the context of 408 negotiations rather than
13 negotiating --

14 THE COURT: That's kind of -- that really is a
15 different issue.

16 MR. McCARRICK: Yes.

17 THE COURT: Okay? You got information, whether it
18 was 408, not 408. Undoubtedly, if there were discovery,
19 you'd probably be asking for the same thing. But the issue
20 on this is whether or not it should be redacted from the
21 pleading.

22 MR. McCARRICK: Yes, and we're happy to meet and
23 confer with that promptly.

24 THE COURT: All right. Okay. So you can move on
25 to your motion to compel arbitration.

1 MR. TOROSIAN: Your Honor, again, Jeff Torosian,
2 DLA Piper, on behalf of Equities First Holdings. Your
3 Honor, our -- the essential question that we're asking
4 ourselves -- obviously, we're happy to be in this beautiful
5 courthouse -- is why are we here. This is a straightforward
6 contract claim against a company that is not a party to this
7 bankruptcy. EFH, which is what I refer to as Equities First
8 Holdings, is not a Debtor, of course, although many of the
9 claims against it here seem to think it is.

10 It's not. It's a privately held LLC based in
11 Indianapolis. It's not a party to this bankruptcy and
12 importantly, it hasn't even filed a proof of claim in this
13 bankruptcy. The contracts on which Celsius bases its claims
14 here have broad and all-encompassing arbitration clauses.
15 They call for the arbitration of any claim, dispute, or
16 controversy relating to the agreements or the relationships
17 resulting from the agreements.

18 And the only relationship here between these
19 parties is these agreements and the actions between them as
20 a result. The arbitration clauses even state that they're
21 supposed to be given the broadest possible meaning. The
22 complaint itself pointed these arbitration clauses out in
23 Paragraph 14. In fact, the whole complaint looks like it
24 was drafted for the purposes of arbitration. Rather than
25 seeking relief from the Court, the complaint says in its

1 claims that it asks for relief from the panel. The claims
2 talk about a final hearing rather than a trial.

3 Making matters more inconsistent, we believe,
4 Celsius may be a mere days away from getting its plan
5 confirmed, which would include an ADR procedure for all
6 claims, including this --

7 THE COURT: ADR is, in an effort to consensually
8 resolve disputes, but go ahead.

9 MR. TOROSIAN: Well, I agree and I have not been
10 part of the trial that's been going on on the plan, but our
11 understanding of the plan ADR procedures is there's a
12 mediation component.

13 THE COURT: There is.

14 MR. TOROSIAN: Which we understand it is not part
15 of our agreement, so we're happy to mediate, frankly. But
16 then there's also an arbitration component which gives each
17 of the defendants the option to either arbitrate under that
18 component or come back to Your Honor and have the case
19 decided there. We -- all the other claims, dozens of other
20 claims for hundreds of millions of dollars are going through
21 this arbitration procedure. We --

22 THE COURT: Have you actually tried to discuss
23 whether mediation is the best way to avoid either the
24 litigation or the arbitration?

25 MR. TOROSIAN: We sought a meeting with counsel

1 and parties in Chicago and were rebuffed for several months.

2 So yes, we have --

3 THE COURT: But you're standing here today and I
4 will probably ask Mr. McCarrick, is the Debtor prepared to
5 mediate. I mean, if -- there have been a number of really
6 difficult disputes that have arisen in this case, sometimes
7 an adversary proceedings, sometimes in the main case, and
8 remarkably, most if not all of those have been resolved in
9 mediation.

10 MR. TOROSIAN: We're happy to mediate, but we
11 still prefer, obviously, if mediation is not successful, to
12 have this case arbitrated pursuant to the parties'
13 agreement. The parties' agreements are not too dissimilar
14 from Your Honor's ADR procedures for arbitration, but there
15 are some nuanced differences and we prefer to be in the
16 arbitration that the parties agreed to as part of their
17 agreement.

18 Why they filed here, why they filed here now, and
19 why they won't consent to this motion is a mystery to us,
20 considering in a matter of weeks, all other claims are going
21 through Your Honors ADR procedure, hundreds of millions of
22 dollars of claims that are very important, just like this
23 claim might be important to them, and there are dozens of
24 them.

25 THE COURT: So, what's not clear to me and that I

1 do want you to address is to whether all of the claims
2 asserted in the complaint against all of the parties are
3 arbitrable or whether some of them are subject to
4 adjudication in the Court. So one of the areas where I do
5 want to hear from both sides is with respect to statutory
6 avoidance claims. And when I say statutory, either under
7 the federal bankruptcy code or under applicable non-
8 bankruptcy state law.

9 MR. TOROSIAN: Sure. Well, let me take that in
10 two different ways. So first off, as to the arbitration
11 clauses themselves and what they cover, Celsius concedes ad
12 Counts 2, 3, 4, 5, and 6, so 2 through 6, are covered by the
13 arbitration clauses. That's been conceded. We believe the
14 disputes cover the rest as well, because all of the rest of
15 the disputes relate to the parties' agreement, parties'
16 relationship, which the only relationship between these
17 parties was as a result of the agreements that are attached
18 to the complaint. All of those other claims are still
19 predicated on that relationship and the allegation that
20 defendants breached those contracts --

21 THE COURT: But you know, avoidance claims are
22 often predicated on the parties' relationship.

23 MR. TOROSIAN: I -- sorry.

24 THE COURT: And, you know, I've written multiple
25 opinions with respect to, for example, whether avoidance

1 claims are arbitrable or not. If they're estate claims,
2 they're not, generally speaking. You are otherwise
3 (indiscernible), but so that's why it's -- you know, it's
4 rare that an avoidable transaction has occurred between two
5 strangers and the fact that underlying a relationship is a
6 contract doesn't determine whether or not avoidance claims
7 are arbitrable or not arbitrable.

8 MR. TOROSIAN: Well, Your Honor, I would argue
9 that the arbitration clause here, which is not just --

10 THE COURT: The arbitration clause doesn't --
11 can't determine if something is an estate claim. The
12 arbitration -- you know, the estate is not a party to the
13 arbitration agreement. The Debtor was a part to the
14 arbitration agreement. There's no dispute about that.
15 Okay, but -- so I disagree with you with respect to, you
16 know, the relationship arose from a contract, but that does
17 not insulate from challenge of voidable transactions, if
18 there are such transactions.

19 MR. TOROSIAN: I think one distinction, Your
20 Honor, here is EFH is not a debtor. So if EFH brought a
21 claim here for an avoidance claim and the defendant said,
22 well, wait a minute, there's an arbitration clause, I agree
23 with you. EFH really might not be bound by that --

24 THE COURT: So, look. What -- among my questions
25 are whether what the Debtor is seeking to avoid is a

1 transfer of property of the estate, property of the Debtor,
2 property of the estate, or whether what they're seeking to
3 challenge -- you say that their avoidance claims are really
4 disguised breach of contract claims. And I understand that
5 among the underlying claims is a transfer by First Equities
6 to -- what, I don't know whether he was the chairman or the
7 principal of the company. What is there that shows whose
8 property it was?

9 For example, if the property in the possession of
10 First Equities was the Debtor's property and First Equity
11 transferred that property to someone else. In my view, I'd
12 like to know why that isn't a proper avoidance claim that is
13 not subject to arbitration.

14 MR. TOROSIAN: The main reason, Your Honor, is
15 because that's not the claim.

16 THE COURT: Well, that's --

17 MR. TOROSIAN: They never --

18 THE COURT: I'm giving you a chance to explain.

19 MR. TOROSIAN: And the claim here, EFH is not a
20 Debtor. EFH can transfer property --

21 THE COURT: No, it can transfer its own property,
22 but --

23 MR. TOROSIAN: Right.

24 THE COURT: -- it can't transfer -- so what do I
25 look at as to whose property it was that was transferred?

1 MR. TOROSIAN: They have not made an allegation
2 that their property held by EFH was transferred to Mr.
3 Christy. They had not made that allegation.

4 THE COURT: So where do I -- where --

5 MR. TOROSIAN: They've said that --

6 THE COURT: And show me in a pleading where -- or
7 in your motion, evidence that shows it was property of First
8 Equities that was allegedly transferred to its principal.

9 MR. TOROSIAN: That's the allegation, Your Honor.
10 They -- the allegation is simply that money was paid as a
11 distribution to Mr. Christy. That's the only allegation.
12 They're not saying it's their --

13 THE COURT: That's what I like to know.

14 MR. TOROSIAN: -- it's their identifiable money.

15 THE COURT: I'm going to ask Mr. McCarrick that
16 question. Is there something where it's alleged that it was
17 property of the estate, property of the Debtor prior to
18 bankruptcy that was transferred.

19 MR. TOROSIAN: No. There's nothing in the
20 complaint that alleges that with respect to the
21 distribution to --

22 THE COURT: Okay.

23 MR. TOROSIAN: -- Mr. Christy. It's just money
24 that's paid as a distribution to presumably Equity. That's
25 the allegation they're making. EFH is not a debtor.

1 They're acting like --

2 THE COURT: You've already said that.

3 MR. TOROSIAN: They're stepping in issues --

4 THE COURT: I understand they're not debtor.

5 MR. TOROSIAN: It would be different --

6 THE COURT: But that would not insulate them from
7 an avoidance claim if they had transferred property of the
8 debtor. I understand, they're not a debtor.

9 MR. TOROSIAN: Right.

10 THE COURT: But if they held in trust, if they
11 held -- if there was something that showed that the assets
12 or property that the debtor transferred to First Equity
13 remained property of the Debtor in the safekeeping of First
14 Equity and then they went ahead and transferred it to
15 someone else.

16 MR. TOROSIAN: Right.

17 THE COURT: Okay. That, if that were the
18 allegation I was faced with, it would be a serious question
19 whether, you know, an avoidance claim not subject to the
20 arbitration agreement would exist in this case.

21 MR. TOROSIAN: And I understand Your Honor's
22 position on that. Those aren't the allegations. That's just
23 not the claim here. They do have a claim for coins, but the
24 agreements at issue say that those coins are not -- they're
25 not collateral in the traditional sense.

1 THE COURT: Is there -- can you point me to
2 language in the agreements that shows that property that
3 Celsius transferred to First Equities remained property of
4 Celsius?

5 MR. TOROSIAN: We can. So there are two --

6 THE COURT: Is there something in your -- is there
7 something in your agreements that says when you transfer
8 crypto to us, it becomes our property to do with as we
9 please?

10 MR. TOROSIAN: We will point -- we will point that
11 to Your Honor with respect to the coins. The other aspect
12 of it is just money. But with respect to the coins -- Your
13 Honor, I'm being handed the master loan agreement which is
14 Exhibit C, Section 2.8 titled "Authority and Rights of the
15 Pledged Collateral." That section says, "The borrower
16 acknowledges that the lender has all rights, title,
17 ownership, and interest associated with the pledged
18 collateral during the term of this agreement."

19 THE COURT: Okay. That's what I'm asking about.

20 MR. TOROSIAN: Yeah, and --

21 THE COURT: Okay.

22 MR. TOROSIAN: -- hopefully it provided Your Honor
23 with an answer. But that's with respect to claims. The
24 other avoidance action, or if you'd call it that, it's a
25 state law, fraudulent transfer action deals with just a

1 distribution that EFH made of money to Mr. Christy that has
2 nothing to do with their property and --

3 THE COURT: Was it money that Celsius transferred
4 --

5 MR. TOROSIAN: No.

6 THE COURT: -- to First -- okay.

7 MR. TOROSIAN: And that's not the allegation.

8 THE COURT: Okay.

9 MR. TOROSIAN: Your Honor, the other issue is core
10 versus noncore. I think we've dealt with that fairly
11 explicitly in the briefs. We believe under Orion and U.S.
12 Lines, the Second Circuit is clear. A post-petition breach
13 of a prepetition contract --

14 THE COURT: Be careful when you cite U.S. Lines,
15 because the determination by the Second Circuit was
16 affirming that the claim again in the U.S. Lines was subject
17 to adjudication by the Bankruptcy Court.

18 MR. TOROSIAN: Well, Your Honor, we believe the
19 Second Circuit was clear, the claim for a post-petition
20 breach of a prepetition contract when the defendant has not
21 a group of claim is not core claim. It's a garden variety
22 breach of contract claim. If this would be a core claim,
23 then everything's a core claim and that's not what the
24 Second Circuit hold, Your Honor.

25 THE COURT: Okay.

1 MR. TOROSIAN: Happy to answer any --

2 THE COURT: All right, thank you very much.

3 MR. TOROSIAN: Thank you.

4 THE COURT: Mr. McCarrick?

5 MR. TOROSIAN: Your Honor, if I may, I believe my
6 co-counsel on behalf of Mr. Christy wanted to address --

7 THE COURT: Okay. Let me hear from -- go ahead.

8 MR. CASAGRANDE: Good morning, Your Honor. Aaron
9 Casagrande from IceMiller on behalf of Alexander Christy. I
10 was going to speak to you today with respect to the claims
11 against Mr. Christy in his individual capacity and why we
12 believe the arbitration agreements in the underlying loan
13 documents and master loan agreements require arbitration --

14 THE COURT: So four of your offices have appeared
15 in -- on this pleading.

16 MR. CASAGRANDE: Three, I think: Indianapolis,
17 Chicago --

18 THE COURT: No, four. Indianapolis, Chicago,
19 Baltimore, and New York. That's four.

20 MR. CASAGRANDE: Yes. Our co-counsel Allison,
21 yes. Forgot about that.

22 THE COURT: And you're from Baltimore?

23 MR. CASAGRANDE: I'm from Baltimore. So Your
24 Honor, the claims against Mr. Christy in his individual
25 capacity here all arise out of his conduct as the CEO and

1 founder of EFH. They are not independent claims against him
2 with respect to conduct that is not tied to his position as
3 CEO and founder of EFH.

4 To attempt to avoid this fact in Celsius'
5 opposition, they tried to create a distinction and said that
6 the claims asserted against him were brought in his
7 individual capacity, but there are no allegations in the
8 complaint of any conduct by Mr. Christy in his individual
9 capacity. The only allegations in the complaint with
10 respect to Mr. Christy relate to his receipt of
11 distributions from EFH, the company of which he is the CEO
12 and founder.

13 Like I said, the claims against Mr. Christy arise
14 out of the loan agreements. Count 1 of the complaint is
15 based on a provision of the loan agreement that required EFH
16 to make certain representations and warranties about
17 distributions to people such as Mr. Christy and other
18 insiders. Moreover, the claims are all predicated on Mr.
19 Christy -- or sorry, are all predicated on Celsius
20 prevailing on its underlying contract claims against EFH.

21 What I really want to discuss is the theory of
22 estoppel and why that theory here requires arbitration of
23 the claims against Mr. Christy by Celsius. In defendant's
24 opening papers, we cite to the decision of Revis v. Schwartz
25 which contains a thorough discussion of this issue. Of

1 note, the Court recognized the fundamental principle
2 underlying this theory of estoppel. It's a necessary rule
3 of application to prevent (indiscernible) of arbitration
4 agreements and to effectuate the intent of signatory parties
5 to arbitrate disputes.

6 In essence, it's to prevent what happened here by
7 suing an officer or director of a company in an attempt to
8 avoid an arbitration provision and an agreement with the
9 company itself.

10 We also cited DeGraw Construction Group v. McGowan
11 Builders on that same point in our opening papers.
12 Plaintiff makes no attempt to address that caselaw. Simply,
13 they cite to DeGraw and say only signatories to an
14 arbitration agreement can enforce an arbitration agreement,
15 but that's not what DeGraw stands for and that's not what
16 the caselaw stands for.

17 I also want to briefly highlight a decision that
18 we cited in our reply brief, the (indiscernible) decision.
19 I think that decision is particularly relevant to the
20 dispute here. There, the Southern District reiterated that
21 a non-signatory to an arbitration agreement may compel
22 arbitration under estoppel when two things occur: there's a
23 close relationship between the parties and controversies
24 involved; and two, the signatory's claims against the non-
25 signatory are intimately found and intertwined with the

1 underlying relationship between the parties, essentially the
2 contract that contained the arbitration agreement.

3 There, the Court found that the close relationship
4 factor was satisfied because the defendants were the
5 president and CEO and the controlling shareholder of the
6 entity subject to the arbitration agreement. Similarly
7 here, as I've already noted, Mr. Christy is the founder and
8 CEO of EFH, the entity that has the contractual right to
9 arbitrate its disputes with Celsius.

10 The (indiscernible) court also found that the
11 claims asserted by plaintiff against the non-signatory
12 defendants were intertwined with the underlying terms of the
13 agreement. Court found that that element of the test was
14 satisfied. The Court continued to compel arbitration of not
15 only the underlying contractual claims that were directly
16 out of the contract, but the related claims of conversion,
17 fraud, tortious interference, breach of a personal
18 guarantee, and fiduciary duty.

19 Essentially, the Court found that all of those
20 claims were derived from the relationship that had the
21 arbitration agreement, the contract had the arbitration
22 agreement, and compelled arbitration of all of those
23 disputes. That's the same here. All of the claims against
24 Mr. Christy are intertwined with the underlying loan
25 agreements and the relationship that was created by those

1 documents.

2 Indeed, Courts have found that when a party
3 depends on the provision of an underlying contract that
4 contains a arbitration agreement against a non-signatory,
5 that's precisely the type of situation in which the non-
6 signatory has the right to seek to compel arbitration of
7 claims asserted against it.

8 By way of example, in Paragraph 33 of the
9 complaint, plaintiff describes a provision of the loan
10 agreements that represented and warranted certain facts and
11 limitations with respect to distributions to Mr. Christy.
12 Plaintiffs alleged that Mr. Christy and EFH violated that.
13 So again, that part of their claim which ties through all of
14 the claims arises out of the loan agreements.

15 Similarly, Paragraph 48 alleges that distributions
16 were completed in violation of the loan agreements and seeks
17 injunctive relieve, again, throughout the entire complaint,
18 all of the claims against Mr. Christy tie back to the
19 provisions of the loan agreement. And again, we would
20 assert that he's entitled to seek arbitration of the
21 disputes against him as well.

22 I don't know if Your Honor has any questions, but
23 I was mainly going to speak on that issue today.

24 THE COURT: Okay. Thank you very much.

25 MR. McCARRICK: Good morning, Your Honor. T.J.

1 McCarrick, Kirkland & Ellis, on behalf of the Debtors. I
2 just want to begin with the mediation point that counsel had
3 had raised. We would note that they proposed a meeting, not
4 any formal mediation. We would be open to discussing that.

5 THE COURT: What's your position on a mediation?

6 MR. McCARRICK: We would be open to discussing
7 that with them, including the logistics, subject to having a
8 qualified mediator. That's something we're happy to explore
9 with them, now that they've made the overture.

10 THE COURT: Well, I'm not sure it was a voluntary
11 overture. It was result of my questions. So I'll just say
12 now, I'm going to take the matter under submission. But I
13 expect you to confer promptly about mediation, and what I
14 would like you to try and do is agree on a mediator. There
15 are a lot of good mediators and, you know, report back to me
16 by Thursday, whether you've been able to agree on mediation
17 and hopefully the selection of a mediator.

18 I have a little bit on my plate at the moment. I
19 don't expect I'm going to be issuing a decision on this in
20 the next few days; let me put it that way. What I would
21 hope would happen is that in fact, you would agree on a
22 mediator. You would set up a prompt schedule for mediation
23 and take a real serious crack at trying to resolve this.
24 That's -- you know, that has successfully occurred in a
25 number of the matters in the Celsius case, either

1 adversaries or adversary proceedings or in -- within the
2 main case and, you know, some get resolved, some don't, but
3 you know, it may be your agreements have provisions about
4 mediation and arbitration and everything. It's not going to
5 get resolved in the next week; let's put it that way. I got
6 a lot going on and if you're able to reach -- if you can't
7 reach an agreement, just put that in writing. I don't need
8 the details. If you can, give me a little bit more flavor
9 whether you can work out an agreement on a mediator,
10 schedule, et cetera.

11 MR. TOROSIAN: Your Honor, can I just be heard on
12 this?

13 THE COURT: Yeah.

14 MR. TOROSIAN: Again, Jeff Torosian for EFH.
15 We're happy to mediate. We're not going to -- I'm sure
16 we'll reach agreement. I'm just looking ahead. The only
17 hiccup I can see, and I don't want to speak for Celsius, is
18 that these claims will be going to the litigation trust to
19 be run by the litigation trustee. I don't know if they'll
20 be in a position --

21 THE COURT: A, they got to get plan confirmed.

22 MR. TOROSIAN: Yeah, exactly.

23 THE COURT: And B, it would have to get to its
24 effective date, which is not -- there's -- under the current
25 plan that's proposed, there are many steps before a plan

1 could become effective, even assuming -- so --

2 MR. TOROSIAN: As long as they have the right
3 people in the room in a mediation and not have to defer to a
4 future time period, I think we'd be happy to --

5 THE COURT: Okay.

6 MR. McCARRICK: We'll make sure the right people
7 are in the room. Okay. Your Honor, EFH's motion to compel
8 should be denied, at least in part. I'd like to divide the
9 analysis along two axes, first by defendant, and second by
10 claim. So picking up where my colleague left off, our
11 position is that Mr. Christy cannot invoke the benefit of
12 the arbitration clauses. No one here disputes that EFH and
13 Celsius agreed to arbitrate certain disputes that are
14 enumerated in the relevant arbitration clauses, but Celsius
15 never agreed to arbitrate its disputes with Mr. Christy and
16 he has no right to invoke those agreements.

17 Just a level set about the subject matter of the
18 claims are alleged against Mr. Christy, which I think help
19 frame things. First is Count 1 for injunctive relief and
20 that's to prevent transfers of assets, property, or payments
21 to Mr. Christy from EFH. And I will come back to Your
22 Honor's question when we go claim by claim about where the
23 complaint is it alleged that these are estate assets. The
24 second claim or the next bucket of claims against Mr.
25 Christy are Counts 8, 9, and 10, and those are various

1 flavors of fraudulent transfer claims as I think Your Honor
2 is aware.

3 So EFH argues that these claims are arbitrable
4 under an agency theory and under an estoppel theory.
5 Neither one of those has merit. As to the agency theory,
6 EFH rightly notes that agents sometimes can lay benefit to
7 the -- to arbitration clauses that are entered into by their
8 principals, but that truism doesn't answer the specific
9 question that's presented here, which is whether Mr.
10 Christy's receipt of certain distributions or so-called
11 bonus payments were in his capacity as an agent of EFH, and
12 it plainly wasn't.

13 Mr. Christy didn't accept the distributions on
14 half of EFH. They're not received into an EFH bank account.
15 They're accepted into Mr. Christy's account, and I would be
16 surprised if counsel here represented today that those
17 payments are in fact property of EFH rather than Mr.
18 Christy. And I think --

19 THE COURT: But --

20 MR. McCARRICK: Yes, Your Honor.

21 THE COURT: Do you contend that the funds that
22 were paid to Mr. Christy were property of the estate?

23 MR. McCARRICK: Our position on that, Your Honor,
24 would be yes, insofar as it is chipping away, I think, at
25 the value of the claims. So we can jump to that, Your

1 Honor, if you'd like.

2 In terms of the complaint in particular, if you go
3 to Paragraph 48, this is where it's referring to the
4 transfers to other creditors and insiders like Mr. Christy
5 and it says "frustrating, jeopardizing Celsius' efforts to
6 recover property of the Chapter 11 estate." And I think
7 when you think about the way --

8 THE COURT: Well, what's the property of the
9 Chapter 11 estate?

10 MR. McCARRICK: That would be the value of the
11 claim, Your Honor, that we are entitled to. And if it is
12 true under the fraudulent transfer claim that EFH is
13 insolvent, those transfers are diminishing and wasting
14 estate assets and chipping away at the pro rata value that
15 we would be able to recover from EFH.

16 THE COURT: Well, it's not estate property. It
17 may be that you have a claim and it's -- you know, your firm
18 didn't handle the StakeHound case, but I'm sure you're
19 familiar with it and from my -- you may disagree with me,
20 but important to me is, whose property was it. That's why I
21 asked counsel to -- what is it that addresses whose property
22 it was not, whether not whether you -- not whether Celsius
23 has a good claim, that may become more difficult to recover.
24 But the injunction is -- you know, this in part where Grupo
25 Mexicano comes into play that that was precisely an issue in

1 StakeHound. Go ahead.

2 MR. McCARRICK: Your Honor, I guess I would also
3 say to the extent that you don't think it's property of the
4 estate --

5 THE COURT: You're looking for a prejudgment
6 remedy --

7 MR. McCARRICK: Yeah.

8 THE COURT: -- against them when it's not estate
9 property. It may be contractually they agreed that they
10 wouldn't make certain transfers to Christy, and you say they
11 breached -- one of the things you say is they breached the
12 contract by doing that.

13 MR. McCARRICK: What I would say is those were two
14 analytically independent claims, Your Honor. Yes, there is
15 a breach of representation claim against Mr. Christy, based
16 on the representations that EFH made about who was getting
17 paid during a specific period of time. But Celsius doesn't
18 have to prevail on that claim in order to prevail on its
19 fraudulent conveyance claim, and what I would say is, even
20 set aside whether or not the property that was transferred
21 to Mr. Christy is the property of the estate, we still don't
22 think that falls within the scope of the arbitration
23 clauses.

24 And the reason we don't think it falls within the
25 scope of the arbitration clauses is twofold. First, EFH

1 invokes the end-relationships language from the MLAs in
2 support of its arguments -- in support of its argument, the
3 fraudulent transfer claims are not -- or are
4 (indiscernible), excuse me. The first thing I would note is
5 those MLAs are only implicated for Celsius' turnover claims.
6 It is the language in the dollarized tranche agreements
7 which are Exhibits F through N, which do not contain that
8 relationships language, that would be relevant for purposes
9 --

10 THE COURT: Which exhibits again?

11 MR. McCARRICK: Exhibits F through N. And that
12 does not have the same relationships language as the
13 original MLAs. So I think the narrow language from the
14 dollarized tranche agreements is what supersedes here. I
15 think EFH all but concedes on Pages 4 to 5 of their reply
16 that the fraudulent transfer claims are collateral to the
17 agreements and that nothing raises questions about the
18 existence, validity, termination, or loan amount under those
19 dollarized tranche agreements. And again, that's language
20 from Exhibit F through N, Section 15.1, Your Honor.

21 And the fundamental point is that anyone of
22 Celsius' -- or excuse me, anyone of EFH's creditors could
23 bring the fraudulent transfer action Celsius has alleged
24 here, right? The foundational elements are that you have an
25 insolvent entity and that they've made an improper

1 distribution. Any creditor with any contract could bring
2 that here, and there's nothing about prevailing on that
3 claim that requires Celsius to prevail on its separate
4 breach of contract claim, which we acknowledge is arbitrable
5 for the breach of the rep in the dollarized tranche
6 agreements.

7 And again, just in case Your Honor wants to know
8 which arbitration clause governs here, the representation
9 that EFH makes so much about is in the dollarize tranche
10 agreements.

11 THE COURT: So Mr. McCarrick, there is a body of
12 caselaw that deals with the issues where a complaint
13 includes arbitrable and non-arbitrable claims, as to whether
14 the non-arbitrable claims should be stayed pending the
15 outcome of the arbitration.

16 Assuming you're correct in your analysis as to why
17 the claims against Christy, some of the claims against
18 Christy, are non-arbitrable, why wouldn't those -- why
19 shouldn't those claims be stayed pending the outcome of the
20 arbitration? It -- I mean, under any version of your
21 argument, doesn't it depend on whether the contracts, any of
22 the contracts with Celsius limited or restricted what
23 distributions could be made to Christy?

24 MR. MCCARRICK: I think the answer that's no, Your
25 Honor, and the reason I would say, and I think you're

1 hitting on it, the body of law around whether or not
2 arbitrable cases should stayed, focuses on whether or not
3 there's an overlap, right?

4 THE COURT: Right. That's why I'm asking that
5 question.

6 MR. McCARRICK: Exactly, and I think the answer
7 here is no.

8 THE COURT: Why not?

9 MR. McCARRICK: Because for the breach of
10 representation claim, it's an up or down. Either they made
11 distributions within the past 12 months to Mr. Christy or
12 they didn't, in breach of that rep or not in breach of that
13 rep. That doesn't require, you know, first -- and I don't
14 even think they dispute they made the distributions to Mr.
15 Christy, which is another reason why I don't think that the
16 non-arbitrable claims should be stayed.

17 For the fraudulent transfer claims, both against
18 Mr. Christy and against EFH, that requires a showing of
19 insolvency plus a transfer under one of the three theories
20 we identified. We don't need to prevail on any of that.
21 None of that's going to be bound up in the underlying
22 allegations in the arbitration, so I just don't think there
23 is the kind of overlap that Your Honor would ordinarily be
24 concerned with when it comes to those fraudulent transfer
25 claims.

1 And so I think the -- I think the -- so that's
2 with respect to the fraudulent transfer claims and I think
3 to the extent Your Honor finds that they're not made in
4 connection with or arising out of the agreement, that's true
5 for Mr. Christy, who we don't think has the right to invoke
6 the clause in any event, but also as to EFH.

7 Now, if we want to look at the turnover action, I
8 think this is an action that comes much closer to Your
9 Honor's as kind of avoidance property of the estate. The
10 agreements here are ended. The Bitcoin collateral that
11 Celsius wants returned to it is property of the estate.
12 That is defined. It's liquidated.

13 And obviously, you know, under 11 USC
14 157(b)(2)(E), orders to turn over property of the estate are
15 core proceedings under the Bankruptcy Code. EFH responds
16 that you're just giving this claim, what's really a breach
17 of contract claim, a bankruptcy gloss.

18 THE COURT: What is it that shows that the Bitcoin
19 collateral is property of the estate?

20 MR. McCARRICK: Yes, Your Honor. If you want --
21 if I wanted to point you to an allegation of the complaint,
22 that would be Paragraph 79. And Paragraph 79 of the
23 complaint refers to the Bitcoin collateral as property of
24 the estate. If you want to look at the agreements, which
25 would tell you that this is a debt that's matured and it's

1 the -- it belongs to the Debtors.

2 Now, I'm not going to get the amount of the
3 Bitcoin collateral, largely because I think, that's probably
4 something we're going to maybe seal, so I'm going to avoid
5 the specific amount. Under the master loan agreements, and
6 that's Exhibit A and Exhibit C, EFH agreed to maintain its
7 full ability to return the pledged collateral at maturity,
8 and that's Section 2.1.

9 Likewise, under the master pledge agreement which
10 is Exhibit B to the complaint, EFH promised to "reassign all
11 right, title, ownership, and interest" in "identical
12 Bitcoins," which I think makes this somewhat different than
13 the ordinary context where you would have --

14 THE COURT: So they breached it. They didn't
15 return it, but it's -- the question in my mind, maybe not in
16 yours, is, whose property was it that they were agreeing to
17 return? So they had a -- what you just told me, if I
18 understand it correctly, is they had a contractual
19 obligation at that point in time to return a like amount of
20 Bitcoin. Bitcoin is fungible.

21 You can't identify -- you know, it's not physical.
22 It's on a blockchain. You can't identify whether it's the
23 same or different. Is there something that -- contractual
24 provision that required them to segregate the Bitcoin that
25 Celsius deposited with them?

1 MR. McCARRICK: So I think the two provisions, I
2 would look at, Your Honor, I think the ultimate answer is, I
3 think we still prevail either way. But to Your Honor's
4 specific question of whether or not they were required to
5 cordon off specific Bitcoins or a specific amounts --

6 THE COURT: I can't believe they were.

7 MR. McCARRICK: -- of Bitcoins, I do think the
8 identical Bitcoins language is unlike what you would see in
9 a lot of other contract --

10 THE COURT: Read it to me again.

11 MR. McCARRICK: Yes, Your Honor. It says, EFH
12 promised to "reassign all right, title, ownership, and
13 interest in identical Bitcoins" upon Celsius' satisfaction
14 of the obligations under the agreement. Now, EFH --

15 THE COURT: I don't know what that means.

16 MR. McCARRICK: That's -- understood, Your Honor,
17 and Bitcoin, I understand it is fungible as a factual
18 matter, so recognizing it's a little unusual and also
19 recognizing there's other contractual language that talks
20 about EFH's ability to rehypothecate.

21 THE COURT: Is there a definitional section that
22 defines?

23 MR. McCARRICK: There is not a definitional
24 section that's going to identical or Bitcoins,
25 unfortunately, but I do think that that presses against the

1 conclusion that they were allowed to do whatever they wanted
2 with the Bitcoin collateral that we had pledged. Now, the
3 last thing, or I guess not the last thing that I would say,
4 Your Honor, is in a letter agreement --

5 THE COURT: So what about -- I was pointed to the
6 MLA which is Exhibit C Section 2.8, which sounded like the
7 language I've been used to seeing in this case --

8 MR. McCARRICK: Yes.

9 THE COURT: -- about all right, title, and
10 interest, the collateral transferred to them.

11 MR. McCARRICK: And rehypothecated.

12 THE COURT: Right.

13 MR. McCARRICK: There's tension.

14 THE COURT: That's -- you know, that's pretty much
15 the language in the language in the terms of use that I
16 interpreted last January.

17 MR. McCARRICK: Yes. I think the one qualifier,
18 Your Honor, would be that the terms of use don't have
19 identical Bitcoin language in a way --

20 THE COURT: But like, how do you square a Section
21 2.8 with the language you're quoting about identical
22 Bitcoin, which is in Exhibit B, the master pledge agreement?

23 MR. McCARRICK: I think the best way to do it is
24 the way that Your Honor started, which was to say they had
25 an obligation to return to you a certain amount of Bitcoin.

1 Maybe not these identical Bitcoins --

2 THE COURT: You have no clue whether they --

3 MR. McCARRICK: Right.

4 THE COURT: There's no way to identify whether
5 they return the same Bitcoins, is there?

6 MR. McCARRICK: Unless they were holding them in a
7 separate account.

8 THE COURT: Sure. And there was nothing that
9 required them to hold them in a separate account.

10 MR. McCARRICK: I think that that is correct, Your
11 Honor. At least, I'm not aware of anything that required
12 them to put it escrow or something to that effect. EFH did
13 -- this is Exhibit E at 1 -- reiterate its obligation to
14 return the outstanding collateral pursuant to the EFH MLAs
15 and all pledge agreements, and that's Exhibit E at 1. And
16 so --

17 THE COURT: And so the collateral that wouldn't --
18 that would in part take you back to Section 2.8.

19 MR. McCARRICK: Correct. I think it would take
20 you all the way back there. I think at the end of the day,
21 though, even if it's not a specific amount of Bitcoin that's
22 being held in a separate account or that a return of
23 specific property isn't required --

24 THE COURT: Let's say Celsius transferred 50
25 Bitcoin.

1 MR. McCARRICK: Yes.

2 THE COURT: I mean, it sounds to me that the
3 agreements required they're going to return 50 Bitcoin to
4 Celsius.

5 MR. McCARRICK: Yes, Your Honor.

6 THE COURT: Nothing -- it's not going to be the
7 identical coins, but there's nothing that required them to
8 segregate or escrow those specific Bitcoin, just, we gave
9 you 50, it's time to give us back 50.

10 MR. McCARRICK: And I think, Your Honor, that once
11 Celsius had satisfied its obligations under the agreements
12 which EFH acknowledges in Exhibit E at Page 1 that Celsius
13 did, to the extent that they had 50 Bitcoins, right, those -
14 - that's property of the estate.

15 THE COURT: Sounds like they had a great breach of
16 contract claim.

17 MR. McCARRICK: I think, though, Your Honor, I
18 think -- I'm not sure that's correct, because I think it's
19 still under 542(b), you have a debt that's matured, payable
20 on demand, and payable on order, at least with -- for
21 purposes of determining whether or not it's a core
22 proceedings. And obviously, Your Honor is allowed to retain
23 jurisdiction over otherwise arbitrable claims that are core.

24 THE COURT: Just give me a second.

25 MR. McCARRICK: Yes, Your Honor.

1 THE COURT: How does 552(b) --

2 MR. McCARRICK: Your Honor, I think the language
3 is -- and if it's not 542(b), I'm sure someone on my team
4 will correct me this.

5 THE COURT: Maybe I misunderstood. 552?

6 MR. McCARRICK: 542.

7 THE COURT: Because -- but 552 deals with post-
8 petition effective security interest.

9 MR. McCARRICK: I'm sorry, Your Honor, 542(b).

10 THE COURT: Okay, let me switch back, there.

11 Okay, I'm looking at 542(b).

12 MR. McCARRICK: And so, Your Honor, that's the
13 Bankruptcy Code statutory provision that we're relying on
14 for the turnover action, and so our view is at the point
15 that EFH had acknowledged that Celsius had completed all of
16 its obligations that are antecedent to return of the Bitcoin
17 collateral that's matured, it's payable on demand, and it's
18 payable on order, EFH's response to this in their opposition
19 and that is that well, you can't bring a turnover action if
20 something is, you know, "disputed."

21 And what they point to is Celsius' declaratory
22 judgment claim and then they have a threadbare statement
23 that they hotly dispute the right to return the collateral.
24 Difficult to square with the August 2021 letter where they
25 say, we discharged all of our obligations, which is the

1 condition precedent to getting that collateral back. But
2 that's what they say.

3 I think the bigger point, Your Honor, is that the
4 caselaw is pretty clear on this. For an action to be a
5 turnover proceeding, it's not relevant that the defendant
6 disputes the existence of the debt by perhaps denying the
7 complaints allegations, as long as the complaint allegations
8 state the existence of a mature debt. And just to give Your
9 Honor some pincites on that, there's in re: Bay Vista of
10 Virginia and that's 394 B.R. 820, 837 (Bankr. E.D. Va.).

11 THE COURT: -- cite again?

12 MR. McCARRICK: Yes. Sorry, Your Honor. The --

13 THE COURT: 394 B.R.?

14 MR. McCARRICK: The Reporter number is 394 B.R.
15 820, 837 (Bankr. E.D. Va. 2008). That's been cited by --
16 with approval by in re: Kenston, and that's 137 B.R. 100,
17 107-108 (E.D.N.Y. 1992). They don't (indiscernible) quote
18 the same language. And in fact, Your Honor quoted that
19 language with approval in in re: MF Global, which is 531
20 B.R. 424, 438. And that's a case that EFH repeatedly cites
21 but not on this particular issue.

22 So our view would be that under 542 we have
23 adequately alleged a turnover action that is a core
24 proceeding, whether or not you think it's return of specific
25 collateral, we think we satisfy the debt is mature and it's

1 payable on demand. That's what we would say about the
2 turnover action.

3 The last point we would make as to the post-
4 petition breaches, understand Your Honor's position on that.
5 We're going to preserve the argument; although, I would say
6 the only claim that I might treat differently would be Count
7 3, the declaratory judgment, the turnover portion of the
8 declaratory judgment claim in Count 3.

9 To the extent that Your Honor is going to retain
10 jurisdiction over the merits of the turnover action itself,
11 it would seem strange to cleave off the declaratory judgment
12 piece of that into arbitration, and I think that will have a
13 much more intrinsic and close connection to the
14 administration of the bankruptcy proceedings to the extent
15 it's actually dealing with property of the estate.

16 THE COURT: Does your argument about the 542(b)
17 turnover claim, to resolve that, does a Court or arbitrator
18 also have to resolve the garden variety breach of contract
19 claim? And if the turnover claim rises or falls from a
20 resolution of the contract claim, isn't that the
21 circumstance in which a Court ordinarily, not always, would
22 stay the turnover claim while the contract claim is resolved
23 in arbitration?

24 MR. McCARRICK: I don't think so and the reason I
25 don't think so is that the breach of contract claims that

1 we're alleging here are for payment of monies under the
2 dollarized tranche agreements and the turnover claim is for
3 -- it's based on different provisions of different, you
4 know, contract for, you know, a specific amount of Bitcoin.

5 And I guess what I would say is to the extent that
6 there are some dispute, effectively Your Honor if EFH's
7 position is well, we dispute your contractual entitlement to
8 that property and that's enough to kick it to arbitration
9 because then you're kind of dealing with a breach of
10 contract action, effectively that would mean anytime someone
11 disputes a turnover claim, you're headed to arbitration.
12 And that's exactly counter, I think, intuitive to the idea
13 that a 542 claim is a core proceeding because it deals with
14 property of the estate.

15 THE COURT: The analysis of whether a core
16 proceeding should -- whether an action that would still be -
17 - that would be a core proceeding should nevertheless be
18 arbitrated, is not -- it's not, you know, I mean, because I
19 have dealt with this before and certainly my colleagues have
20 dealt with this before. Not all core claims get litigated.
21 Some, you nevertheless have to submit to arbitration. So
22 why -- so assuming that this is a properly stated core claim
23 for turnover, why wouldn't this nevertheless be subject to
24 arbitration? It's not -- I mean, the core, non-core is
25 important but not determinative.

1 MR. McCARRICK: Understood, Your Honor. Celsius'
2 position is not that this wouldn't be arising out of in
3 connection with the agreements. Of course, it is. I think
4 part of it depends on what exactly EFH or how, if at all,
5 they intend to dispute it and --

6 THE COURT: Have they -- other than in protected
7 settlement discussions, have they asserted the basis on
8 which they dispute?

9 MR. McCARRICK: Other than saying they hotly
10 dispute the entitlement to that, I'm not sure of the precise
11 basis and I understand --

12 THE COURT: The hotly puts it over the line?

13 MR. McCARRICK: That's -- yes. It's the hotly
14 principle. What I would say is knowing more about that
15 would help me answer that question more precisely, but in
16 the absence of a specific allegation of why that's not going
17 to be, or why that's not owing to us when they represented
18 in Exhibit E that we had satisfied all conditions precedent,
19 I don't think that we're -- we don't think that that should
20 go to arbitration, at least just on the threadbare assertion
21 of it's a dispute.

22 THE COURT: I mean, I've never done this before.
23 There's always a first time. It may be I can't resolve the
24 motion until there's been some limited discovery. You know,
25 yes, turnover claim is core, but some core claims, many core

1 claims -- somewhere in between that -- get arbitrated and
2 some don't.

3 MR. McCARRICK: The most specific, at least is as
4 I'm recalling some of the correspondence, is that there are
5 some suggestion of some sort of fraudulent inducement kind
6 of claim. I think that's difficult given how many times
7 they've re-ratified the agreements and the number of
8 dollarized tranche pieces. But I'm not sure exactly what
9 their defense is going to be, so I'll reserve on that.
10 That's all I have, Your Honor.

11 THE COURT: Okay, thank you.

12 MR. McCARRICK: Thank you.

13 MR. TOROSIAN: Thank you, Your Honor. Jeff
14 Torosian, DLA Piper, for Equities First Holdings. Your
15 Honor, obviously, we haven't even answered or responded
16 substantively to this complaint, but I will tell you --

17 THE COURT: Maybe I should require that that
18 happen first, so I can see what it is rather than just pure
19 pabulum as your defenses, why it is -- I mean, I think -- I'm
20 not saying I'm persuaded yet, but I think Mr. McCarrick has
21 made, what on its face would seem to be a persuasive
22 argument why the turnover claim, why it doesn't fit squarely
23 within 542(b) and should be required to be litigated, not
24 arbitrated. And -- go ahead.

25 MR. TOROSIAN: (indiscernible) respond, Your

1 Honor. First of all, we do challenge the enforceability of
2 these agreements. We believe they were --

3 THE COURT: You what?

4 MR. TOROSIAN: We do -- we will challenge --

5 THE COURT: You're relying on an arbitration
6 clause in something you say is an unenforceable agreement.

7 MR. TOROSIAN: Not the arbitration --

8 THE COURT: Oh, not the arbitration clause, it's
9 just the rest of the agreements you don't like,

10 MR. TOROSIAN: The agreements were fraudulently
11 induced and that will be one of our defenses here, but
12 fraudulent inducement in dealing with the arbitration clause
13 to get out of the arbitration clause when you have a
14 fraudulent inducement allegation --

15 THE COURT: Tell me on what basis you contend the
16 agreements were fraudulently induced. That's a specific
17 question. I want a specific answer.

18 MR. TOROSIAN: Your Honor, at the time of these
19 agreements that they were -- that they were amended and had
20 payment obligations, the -- Celsius had an obligation 90
21 days before repayment of these repo transactions to inform
22 us that they had the ability to pay off these loans. We
23 don't believe they did, and to the --

24 THE COURT: They paid off the loans and you think
25 they didn't tell you 90 days before that we have the ability

1 to pay off? Is that what you're telling me?

2 MR. TOROSIAN: Your Honor, if you understand the
3 structure of how these agreements work, we provide money in
4 exchange for Bitcoin and equities that they give us. At the
5 time the loan comes due, 90 days before, they have to tell
6 us that they have the ability to repay these loans and then
7 we give whatever equity or Bitcoin back.

8 THE COURT: And you're saying they didn't tell you
9 they had the ability, they just simply paid it off?

10 MR. TOROSIAN: We said, when they told us they had
11 the ability to pay hundreds of millions of dollars of loans
12 off, they were fraudulently inducing us to have an
13 obligation to pay them back. A lot of --

14 THE COURT: They did pay you back, right?

15 MR. TOROSIAN: No, they did not. They did not.
16 There was a series of tranches that were supposed to come
17 due. We were told that they had the ability to pay off all
18 of those tranches when we don't think they actually did have
19 that ability.

20 THE COURT: So they paid off some of the tranches
21 and they want the collateral back from that?

22 MR. TOROSIAN: They -- we reached the agreements
23 that are part of this claim in connection with the first
24 tranche payoff. And so we never got to the other tranche
25 payoffs. And we believe that they fraudulently induced us

1 into this whole new payment scheme as a result of saying
2 they have the ability -- I don't want to give amounts, but
3 they had the ability to pay off all of the amounts for all
4 of the tranches, when they didn't.

5 We also believe that there's a question and we
6 haven't done the final analysis of this, yes, but there's a
7 question of whether they had good title to the Bitcoin that
8 they gave us, which transferred --

9 THE COURT: Really?

10 MR. TOROSIAN: -- title to us.

11 THE COURT: Really?

12 MR. TOROSIAN: Your Honor, we've been in this case
13 for three weeks. It's a large case.

14 THE COURT: Did you read my January 4th, 2023
15 decision on the who the crypto asset, whose property it was?
16 Did you?

17 MR. TOROSIAN: I have not, Your Honor, and I have
18 not --

19 THE COURT: Maybe you ought to go read it.

20 MR. TOROSIAN: Well, Your Honor, this is a
21 separate dispute with a separate adversary and we will get
22 into --

23 THE COURT: Nonsense. Nonsense.

24 MR. TOROSIAN: Your Honor, I'm not --

25 THE COURT: You can't make it up as you go.

1 MR. TOROSIAN: I'm not making it up as I go, Your
2 Honor, but we haven't even answered this complaint yet.

3 THE COURT: I think you should do that.

4 MR. TOROSIAN: Well, I -- Your Honor --

5 THE COURT: I think you should do that.

6 MR. TOROSIAN: -- don't think we should have to do
7 that here.

8 THE COURT: When is the answer due, Mr. McCarrick?

9 MR. TOROSIAN: There is no answer due, Your Honor,
10 because --

11 THE COURT: Well --

12 MR. TOROSIAN: -- right now this motion --

13 THE COURT: Your answer is due 30 days from today.

14 MR. TOROSIAN: Well, Your Honor, we have defenses
15 --

16 THE COURT: I will enter an order today requiring
17 responsive pleadings to be filed to this complaint before I
18 decide the motion to compel arbitration, and you better lay
19 out all your defenses and it better be specific.

20 MR. TOROSIAN: Well, Your Honor --

21 THE COURT: That's what -- that's my order. I'm
22 going to enter an order today.

23 MR. TOROSIAN: And we move to dismiss at the same
24 time. We have motions --

25 THE COURT: You know, you can follow -- you follow

1 the rules. I'm requiring a responsive pleading. Okay. And
2 30 days. I'm being generous by saying 30 days from today.
3 And confer about mediation as I discussed. After I see the
4 answer, you file a motion, I'll see any response to it,
5 I'll, you know, in due course, get to your motion to compel
6 arbitration.

7 MR. TOROSIAN: Your Honor, may I just point Your
8 Honor to some other contract language --

9 THE COURT: Sure.

10 MR. TOROSIAN: -- that Your Honor had questions
11 on? In Section 6.1.

12 THE COURT: Of which?

13 MR. TOROSIAN: Of the master pledge agreement
14 between Celsius and Equities First, which is Exhibit B. The
15 last sentence says, "The lender may combine the pledged
16 collateral with other assets and is under no obligation to
17 sequester or escrow the pledged collateral."

18 THE COURT: Is that in the papers that you filed
19 with me or you just finding that now?

20 MR. TOROSIAN: Your Honor, you asked a question
21 whether --

22 THE COURT: I know. I mean, did you brief -- is -
23 - I asked questions and I appreciate you're pointing me to
24 it. Is that in your papers?

25 MR. TOROSIAN: Your Honor, our paper said that

1 there is no claim here for property of the estate and that
2 this was collateral -- was not --

3 THE COURT: Anything else you want to point me to?

4 MR. TOROSIAN: Your Honor, no, thank you.

5 THE COURT: All right. I'm taking it under
6 submission. I'm going to enter an order today requiring a
7 responsive pleading -- pleadings, because there's more than
8 one defendant, to be filed within 30 days from today.
9 Please meet and confer on mediation and just update me in a
10 letter as to whether or not you've been able to agree that
11 there will be a mediation and if you can agree on a mediator
12 and it doesn't have to all be at the same time. Let's move
13 this forward. Okay, I'm taking the motions under
14 submission. All right.

15 Ms. Jones, we have anything else on the calendar
16 for today?

17 MS. JONES: No, Your Honor. The other motions
18 that were up for today were the substantial contribution
19 which --

20 THE COURT: Right. We put those off until --

21 MS. JONES: Yeah.

22 THE COURT: -- November 30th.

23 MS. JONES: Yes. That's right.

24 THE COURT: All right. We are adjourned. Thank
25 you very much.

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MS. JONES: Thank you.

(Whereupon these proceedings were concluded at
11:18 AM)

I N D E X

RULINGS

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Three Arrows motion for relief from stay,		
granted	12	23

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

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Date: October 25, 2023

[& - action]

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